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No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually, and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100,

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NEW JERSEY ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the New Jersey Association of Counties respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the Petitioners' petition for a writ of certiorari in this matter. The Petitioners have consented to the filing of this brief; however, the Respondent has refused to provide consent.

The New Jersey Association of Counties ("NJAC") is a private corporation of the State of New Jersey. Its members include each of New Jersey's twenty-one counties. Each county, in turn, is a political subdivision of the State of New Jersey. NJAC speaks for New Jersey's twenty-one counties on issues of legislation affecting county government, and also provides information and support to individual county governments on issues and matters of common concern.

Among the issues facing each of New Jersey's counties is the relationship between the county and the county prosecutor. The prosecutor is appointed by the State of New Jersey, not by county government, and is responsible for acting as the agent of the State in the prosecution of criminal offenders and the enforcement of criminal laws. As discussed in the attached brief, counties serve as the funding agency for county prosecutors; however, New Jersey counties have no control over the personnel decisions made by the prosecutors. Specifically, counties lack control over promotion decisions involving investigators employed by county prosecutors.

In *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), the Third Circuit imposed compensatory and punitive damage liability against one of New Jersey's counties in a case involving alleged discrimination under the New Jersey Law Against Discrimination against a female investigator employed by the Monmouth County Prosecutor. The alleged discrimination took the form of repeated failures to promote. In reaching this determination, the Third Circuit ignored the controlling decision of the New Jersey Supreme Court in *Lehmann v. Toys 'R' Us. Inc.*, 626 A.2d 445 (N.J. 1993), which holds that agency principles govern the scope of employer liability for damages under the New Jersey Law Against Discrimination. The Third Circuit also disregarded well-established New Jersey law that holds that the prosecutor is an employer in his/her own right, and that county government has no control over promotion decisions involving investigators employed by the prosecutor.

Each of NJAC's member counties is familiar with the relationship between county government and the county prosecutors. Each of New Jersey's twenty-one counties share a common concern that the Third Circuit's decision below, if allowed to stand, would expose county government to compensatory and punitive damage liability in cases over which county government has absolutely no control. Finally, each of New Jersey's twenty-one counties, as political subdivisions of the State of New Jersey, share a common concern that federal courts apply controlling state precedent when addressing issues of state law, and not feel free to disregard controlling state precedent in an effort to obtain results that federal courts feel to be "correct". For these reasons, NJAC respectfully

requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of Petitioners' petition for a writ of certiorari.

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STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article VII, §11, ¶1, provides:

> County prosecutors shall be nominated and appointed by the Governor with the advice and consent of the Senate. Their term of office shall be five years, and they shall serve until the appointment and qualification of their respective successors.

N.J. CONST. of 1947, Art. VII, §11, ¶1.

The relevant portions of the New Jersey Law Against Discrimination, N.J. STAT. ANN. §10:5-1 to 5-42, are reproduced in the appendix to Petitioners' Petition for Writ of *Certiorari*.

New Jersey Statute §2A:158-5 provides:

> Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws.

N.J. STAT. ANN. §2A:158-5.

New Jersey Statute §2A:157-10 provides:

> In addition to the office of county detective, there is created in the office of the prosecutor, the office or position of county investigator which shall be in the unclassified service of the civil service. The prosecutor of each of the several counties of this state may appoint such

> number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this act provided, to be known as county investigators, to serve at his pleasure and subject to removal by him, and to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs, in criminal matters.

N.J. STAT. ANN. §2A:157-10.

SUMMARY OF ARGUMENT

The Third Circuit's decision below disregards controlling precedent of the New Jersey Supreme Court concerning liability for compensatory and punitive damages under the New Jersey Law Against Discrimination. The Third Circuit's disregard of controlling state precedent is a violation of the *Erie* doctrine.

The New Jersey Supreme Court has held the scope of employer liability for compensatory damages to be governed by principles of agency law. When considering the liability of the County of Monmouth for the alleged discriminatory actions of the State appointed prosecutor against one of his investigators, the Third Circuit refused to apply theories of agency law, instead opting for a theory of strict liability based on a novel test of the Third Circuit's own creation.

Because the Appellate Court below could find no agency relationship between the County of Monmouth

and the State appointed prosecutor, it determined that liability should nevertheless attach to the County because the County was the government entity to which the prosecutor "most closely belongs" when the prosecutor makes personnel decisions. This determination ignores a multitude of New Jersey case law holding that prosecutors of that state are constitutional state officers and the exclusive employers of the investigators in their offices.

This honorable Court must, therefore, reject the Third Circuit's unwarranted and constitutionally unjustified attempt to disregard the *Erie* Doctrine in such a way as to allow federal courts to disregard the decisions of state courts on issues concerning their respective laws; imposing instead the federal court's view as to how that state law should develop. This honorable Court must also reject the Third Circuit's attempt to reclassify the status of New Jersey's prosecutors for the purpose of imposing liability on New Jersey counties for the prosecutor's actions.

ARGUMENT

POINT I

THE TEST ADOPTED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT FOR EMPLOYER LIABILITY FOR DISCRIMINATION RESULTING FROM PERSONNEL DECISIONS OF A NEW JERSEY COUNTY PROSECUTOR UNDER THE STATE'S LAW AGAINST DISCRIMINATION RUNS CONTRARY TO THE INTERPRETATION OF THAT STATUTE BY THE NEW JERSEY SUPREME COURT, AND WOULD NOT FURTHER THE PURPOSE OF THAT STATUTE, AS SUCH, THE THIRD CIRCUIT HAS DONE NOTHING LESS THAN RE-WRITE THE DOCTRINE OF *ERIE R.R. v. TOMPKINS*.

Amicus NJAC joins in all arguments presented by Petitioners in favor of granting *certiorari* in this matter. However, NJAC seeks to specifically address the Third Circuit's determination that compensatory and punitive damages in this matter could run against Petitioner Monmouth County, a political subdivision of the State of New Jersey separate and distinct from Petitioner Kaye.

It is a well-settled tenet of federalism that in matters of pendent jurisdiction in which a state's statute is implicated, federal courts must defer to that state court's interpretation of the statute. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966) (extending application of the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), to actions in which federal jurisdiction is conferred on pendent grounds to state law claims); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 (1992); *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986).

The Court of Appeals for the Third Circuit has disregarded the New Jersey Supreme Court holding that employer liability for sexual discrimination under the New Jersey Law Against Discrimination ("LAD"), N.J. STAT. ANN. §10:5-1 to 5-42, "shall be governed by agency principles." *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 461 (N.J. 1993). The Court of Appeals applied instead a theory of strict liability upon Monmouth County, the government entity to which it felt the prosecutor most closely "belong[ed]," *Coleman v. Kaye*, 87 F.3d 1491, 1503 (3rd Cir. 1996), citing its belief that such a result would be appropriate under the LAD. The Third Circuit reached this conclusion despite its candid admission that *Lehmann* would bar any recovery against Monmouth County. In doing so, the Third Circuit not only disregarded the New Jersey Supreme Court's interpretation of the LAD, but also disregarded New Jersey precedent establishing the county prosecutor as a state official and the Respondent's sole employer for purposes of personnel decisions. As such, to allow the Third Circuit's decision below to stand is to accept a *sub silentio* revision of the *Erie* doctrine; namely, that Federal courts now are free to disregard controlling precedent of a state's highest court to reach a result under state law the federal court feels is "correct." Such an affront against the principles of federalism espoused in *Erie* surely warrants review by this Court.

A. The Controlling Precedent Of The New Jersey Supreme Court, Interpreting The LAD, Establishes That Liability For Damages Under The LAD Must Be Premised On Agency Principles.

In 1993, the New Jersey Supreme Court, following the suggestion of this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), held in *Lehmann*, that damages are available under the LAD, as against employers in sexually hostile work environment claims, based solely on general principles of agency law. *Lehmann*, 626 A.2d at 460.

Under *Lehmann*, an employer could be held liable for compensatory damages "stemming from a supervisor's creation of a hostile work environment if the employer grants the supervisor the authority to control the working environment and the supervisor allows that authority to create a hostile work environment." *Id.* at 464. This agency theory of liability applies to all cases of discrimination based on sex brought under the LAD, regardless of whether sexual harassment, or sexual discrimination generally, is alleged. *Maczik v. Gilford Park Yacht Club*, 638 A.2d 1322, 1325 (N.J. Super. Ct. App. Div.), *cert. denied*, 649 A.2d 1284 (N.J. 1994).

The purpose of the LAD is to eliminate discrimination and harassment in the workplace. *Lehmann*, 626 A.2d 458. To accomplish this, the State Supreme Court reasoned that:

> the employer must take action, because generally the employer is the party with the power and responsibility to hire, promote, reinstate, provide back pay, and take other remedial action. Likewise, only the employer can impose

> prospective measures to prevent future discrimination and harassment in the workplace.

Id. at 460. Thus, the *Lehmann* Court found that the employer is the party best suited to eliminate workplace discrimination because the employer controls the workplace and the employer-employee relationship. In the State of New Jersey, however, as discussed in subpoint B, *infra*, counties have absolutely no control or authority over the promotion of investigators employed in the various county prosecutors' offices. That authority belongs to the prosecutor exclusively. Thus, the Third Circuit's novel test of imputing liability for compensatory damages to the government entity to which the prosecutor is deemed to "belong," furthers in no way the remedial purpose of the LAD.

By requiring that agency principles govern the scope of employer liability under the LAD, the State Supreme Court furthered the purpose of the LAD by providing employers with a reason to take affirmative steps toward eliminating workplace harassment and discrimination. For example, an employer may mitigate and/or possibly avoid compensatory or punitive damages in sexual harassment cases by demonstrating that it has in place and enforces well-publicized anti-harassment policies, effective formal and informal complaint mechanisms, training, and/or monitoring mechanisms. *Id.* at 463. Application of a theory of strict liability against counties for discriminatory conduct allegedly engaged in by a prosecutor or his/her agents serves in no way to eliminate discrimination in the prosecutor's office, because, as discussed below, counties have absolutely no ability to implement anti-discrimination policies in regard to the

prosecutors' investigators, at least with regard to promotions. Indeed, a strict liability standard for compensatory damages was rejected by the State Supreme Court in *Lehmann*. *Id.* at 449.

B. New Jersey Precedent Establishes That Prosecutors, And Prosecutors Alone, Enjoy Exclusive Control Over The Appointment And Promotion of Investigators; The Counties Are Powerless To Affect Promotion Decisions Involving Investigators.

The Court of Appeals failed to apply New Jersey law to Respondent's LAD claim because, it reasoned, doing so would imply that the prosecutor, a state official and constitutional officer, was not acting on another's behalf when making personnel decisions. *Coleman*, 87 F.3d at 1491. The Court of Appeals found such a result "untenable." There is no support for the Third Circuit's belief that a county prosecutor's personnel decisions must be undertaken on behalf of someone or something other than the prosecutor himself. Similarly, the Third Circuit's distinction between the prosecutor's status when making personnel decisions as opposed to at any other time is artificial and without basis in law.

The county prosecutors of the State of New Jersey are, like its Attorney General, Constitutional officers. *See* N.J. Const. of 1947, Art. VII, §II, ¶1. The office of county prosecutor is " 'carved' out of that of the Attorney General of the State and made an *independent office* having control of the criminal business of the State arising within such county." *State v. Winne*, 91 A.2d 65, 73 (N.J. Super. Ct. Law Div. 1952), *rev'd on other grounds*, 96 A.2d 63 (N.J.

1953) (emphasis supplied); *see Morss v. Forbes*, 132 A.2d 1, 16 (N.J. 1957). As such, the position of county prosecutor has long been recognized as that of a state officer. *See CWA v. Treffinger*, 677 A.2d 295, 299 (N.J. Super. Ct. Law Div. 1996) ("[t]he prosecutor is a constitutional state officer"); *Warren v. Hudson Cty.*, 50 A.2d 877, 879 (N.J. 1947) ("a county board of taxation is just as much a State agency, and its members State officers, as the county prosecutors of the pleas and the judges and clerks of the several district courts of this State are State officers."); *Passaic Cty. Pros. v. Passaic Cty. Freeholders*, 387 A.2d 1219, 1221 (N.J. Super. Ct. App. Div.), *cert. granted and remanded* 391 A.2d 524 (N.J. 1978).

It is the responsibility of the prosecutor and the State's Attorney General to prosecute all criminal business of the State. N.J. STAT. ANN. §2A:158-4 (West 1985). In doing so, each prosecutor is required to use "all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." N.J. STAT. ANN. §2A:158-5 (West 1985).

> [T]he legislature as well as the county have long recognized the strong policy considerations which dictate that since the county prosecutor is charged with heavy enforcement responsibilities he must be given broad powers to appoint his own personnel. . . .

Cetrulo v. Byrne, 157 A.2d 297, 301 (N.J. 1960). To aid him in carrying out that function, the prosecutor is empowered to appoint and employ assistant prosecutors, N.J. STAT. ANN. §2A:158-5 (West 1985); legal assistants, N.J. STAT. ANN. §2A:158-18.1 (West 1985); detectives, N.J. STAT. ANN. §2A:157-2 (West 1985); and investigators, N.J.

STAT. ANN. §2A:157-10. *"[T]he prosecutor is the exclusive employer and/or hiring authority for his office. The County [does] not hire nor does it employ the members of the prosecutor's office." CWA v. Treffinger,* 677 A.2d at 302. (emphasis supplied) In fact, in *Cetrulo, supra,* the New Jersey Supreme Court held that legislative agencies, such as county freeholder boards, had no authority to appoint assistants to the prosecutor, *id.* at 298; in other words, the New Jersey Supreme Court has held county governing bodies to be *excluded* from such personnel decisions involving the prosecutor's office.

The county serves only as a funding agent to the prosecutor and his staff. N.J. STAT. ANN. §2A:158-7 (West 1985) requires the county in which the prosecutor is appointed to pay "[a]ll necessary expenses incurred by the prosecutor . . . in the detection, arrest, indictment and conviction of offenders against the laws." *Id.* But neither the county, nor its officials, have any authority to direct, discipline, or otherwise control any personnel in the prosecutor's office, including prosecutor's investigators.

In *Zamboni v. Stamler,* 489 A.2d 1169 (N.J. Super. Ct. App. Civ. 1985), the New Jersey Superior Court, Appellate Division, noting the State Supreme Court's recognition that the prosecutor "must have free rein to select and remove" his investigators at will, *Id.* at 1173 (quoting *Cetrulo v. Byrne,* 157 A.2d 302, found the prosecutor to have the "corollary authority to organize and structure his investigative staff consonant with his perception of the particularized needs of his office." *Id.* Thus, the prosecutor's authority to make personnel decisions within his own office is incidental to his responsibility for detection, apprehension, arrest and conviction of criminals through

the use of his office staff. The prosecutor possesses the sole authority to create supervisory investigator positions and to promote employees thereto. *Id.* at 1175.

This authority is not distinct from his responsibility, as a State officer, to prosecute all criminal business of the State. The prosecutor's authority to make personnel decisions is a necessary aspect of his duty to prosecute the criminal business of the State. New Jersey's counties have absolutely no say in those personnel decisions.

In the recent case of *CWA v. Treffinger, supra,* the New Jersey Superior Court, Law Division, held that members of the Essex County prosecutor's office are not subject to the County's employee residency requirement. *CWA,* 677 A.2d at 302. That case involved the attempt by numerous county employee organizations, among others, to have invalidated a residency requirement for all county employees. Among those who filed suit against the County and its County Executive were the Essex County Prosecutor, the Essex County Prosecutor's office, and employee representatives for the assistant prosecutors and detectives and investigators.

After an exhaustive review of the relevant New Jersey statutes and case law, the Law Division found the prosecutor to be the "exclusive employer of his office." *Id.* at 301. For this reason the court found inapplicable to the prosecutor's staff the state statute authorizing residency requirements for employees "employed by the local unit," N.J. STAT. ANN. §40A:9-1.3, i.e., the county. *See CWA,* 677 A.2d at 298-302.

In reaching this conclusion, the *CWA* court relied in part on State court decisions which recognized the prosecutor as his staff's employer for the purpose of negotiating collectively over terms and conditions of their employment. Although the criteria for promotion are not terms and conditions of employment subject to collective negotiation under the New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. §34:13A-1; *et seq.*, procedures for promotion are. *See State v. State Supervisory Employees Assoc.*, 393 A.2d 233, 252 (N.J. 1978).

In *In re Matter of Middlesex County Prosecutor,* 605 A.2d 265 (N.J. Super. Ct. App. Div. 1992), the Appellate Division of the New Jersey Superior Court held that:

> [a]s public employer, the [prosecutor] has the duty under the New Jersey Employer-Employee Relations Act, [N.J. STAT. ANN. §] 34:13A-1, *et seq.*, to, among other responsibilities, maintain terms and conditions of employment and to bargain in good faith with [his staff's bargaining representatives.]

In re Middlesex, 605 A.2d at 269. In that case the State's Appellate Division upheld an agency finding that the county prosecutor, as the public employer of his detectives and investigators, could commit and be held accountable for unfair labor practices. Significantly, no liability was run against the county itself.

The Third Circuit's reliance on *Dunne v. Fireman's Fund Am. Ins. Co.*, 353 A.2d 508 (N.J. 1976), to support its finding that county prosecutors possess a hybrid status is misplaced. In *Dunne,* the New Jersey Supreme Court was called upon to determine who employed three detectives in the prosecutor's office for purposes of coverage under

a Morris County insurance policy. Endorsements to that policy redefined the coverage terms to include an employee of Morris County "while acting within the scope of his duties as such." *Id.* at 510-11. The Court found the detectives to possess a "hybrid status," qualifying as county employees for the purpose of coverage under that specific insurance policy.

The *Dunne* holding is "limited to a determination of who was the employer of the detectives for insurance coverage purposes, *i.e.*, administrative and remunerative purposes." *CWA*, 677 A.2d at 301. The *Dunne* court made no determination as to the employment status of prosecutor's investigators where promotional decisions are concerned. As argued *supra* at 10-12, the Appellate Division of the New Jersey Superior Court in *Zamboni, supra,* has since held that promotional decisions are within the exclusive discretion of the prosecutor, whom the New Jersey Supreme Court identifies in *Dunne* as a "State officer". *Dunne,* 353 A.2d at 510.

It is clear from the above cited case law that contrary to the Third Circuit's finding, county prosecutors are the exclusive employers of the employees in their offices, including investigators. Those employees are employed by the prosecutor to aid him in the enforcement and prosecution of the law. Any personnel decisions made by him, as his staff's employer, are incidental to his responsibilities concerning the criminal business of the state. The distinction the Third Circuit attempted to draw between law enforcement and administrative actions, and the Third Circuit's apparent belief that a prosecutor's personnel decisions must be attributable to some political

subdivision of the State other than the prosecutor himself, finds absolutely no basis in New Jersey law.

C. To Allow The Third Circuit Decision To Stand Would Be To Allow Federal Courts To Disregard Controlling Precedent On State Law Issues And Impose Their Own Sense Of What Results Are "Correct", Such A Result Constitutes A Significant Revision Of The *Erie* Doctrine.

As discussed in subpoints A and B, *supra*, the Third Circuit's decision below disregards controlling precedent of the New Jersey Supreme Court with regard to liability for damages for sex discrimination under the New Jersey Law Against Discrimination. The Third Circuit decision below also disregards well-established state precedent holding the prosecutor to be the sole employer of the investigators he appoints, at least with regard to promotions.

Had the Third Circuit adhered to this controlling precedent and established State law, it would have had no choice but to dismiss all damage claims against Monmouth County. However, the Third Circuit choose to instead apply its own conception of what the "correct" result should be. Such an outcome constitutes nothing less than the substantial revision of the *Erie* doctrine.

Under the *Erie* doctrine, "the law to be applied in any case" other than cases involving federal law

> is the law of the state. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not

> a matter of federal concern. . . . Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general."

Erie R.R., 34 U.S. at 78. To do otherwise is to invade rights which are reserved by the United States Constitution to the states themselves. *Id.*, at 79-80. The *Erie* doctrine goes to the heart of the relations between federal governments and the states. Surely, any Circuit opinion that would have the affect of modifying or derogating from this well established doctrine of federalism warrants review by this Court.

The Third Circuit decision below derogates from the *Erie* doctrine by allowing federal courts to take an "outcome determinative" approach to State law issues. Under the Third Circuit approach, if a particular result mandated by controlling state precedent offends what the court believes to be the "correct" result under state law, the federal court is free to disregard the state precedent. Such an approach is not only inconsistent with *Erie*, but would also constitute a major – and unjustified – change in the relationship between federal and state courts. Contrary to *Erie*, it would allow a litigant to obtain a different result based upon whether he or she chose to bring her claim in federal or state court, notwithstanding the fact he or she is asserting a state law claim.

This Court must grant Petitioners' petition to review the Third Circuit's inappropriate attempt to modify the *Erie* doctrine. In the alternative, the Court may, as requested by Petitioners, exercise its authority to summarily vacate the Third Circuit's judgment, and remand the cased to the Third Circuit with instructions to apply

the *Erie* doctrine properly and to reach the result that the Third Circuit itself recognized it was mandated by the decision of the New Jersey Supreme Court in *Lehmann.*

CONCLUSION

It is respectively submitted that Petitioners' Petition must be granted to allow this Court to reject the Third Circuit's unwarranted and constitutionally unjustifiable attempt to re-write the *Erie* doctrine in such a way as to allow a federal court to disregard the decisions of the highest court on issues of State law, and to impose its own view as to how the law of the State should develop. In the alternative, this Court must summarily vacate the judgment of the Third Circuit, and remand with instructions to adhere to the *Erie* doctrine as developed by this Court, and to follow the precedent of the New Jersey Supreme Court on the controlling issues of State law presented herein.

Respectfully submitted,

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